Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022
LANE POWELL LLC
1600 A Street, Suite 304
Anchorage, Alaska 99501
Telephone: 907-264-3325
907-264-3303
jamiesonb@lanepowell.com
baylousm@lanepowell.com
Attorneys for Appellant Tall With Mike

Craig Richards, ABA No. 0205017
LAW OFFICES OF CRAIG RICHARDS
810 N Street, Suite 100
Anchorage, Alaska 99501
Telephone: 907-306-9878
crichards@alaskaprofessionalservices.com



IN THE SUPREME COURT FOR THE STATE OF ALASKA

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|---|---|
| STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS; STAND TALL WITH MIKE, an independent expenditure group,<br><br>Appellant,<br><br>v.<br><br>RECALL DUNLEAVY, an unincorporated association,<br><br>Appellee. | Supreme Court Nos. S-17706, S-17715<br>Trial Court No. 3AN-19-10903 CI<br><br>**AFFIDAVIT OF BREWSTER H. JAMIESON IN RESPONSE TO RDC'S EMERGENCY MOTION TO LIFT STAY** |

STATE OF ALASKA )
) ss.
THIRD JUDICIAL DISTRICT )

I, Brewster H. Jamieson, being first duly sworn, state as follows:

1. I am an attorney with Lane Powell LLC, counsel for Appellant Stand Tall With Mike ("STWM"), and I have personal knowledge of the contents of this affidavit. This affidavit is filed in support of STWM's Opposition to Motion to Lift Stay Pending

Appeal, and it identifies documents cited in that filing, which are attached as exhibits to this affidavit.

2. **Exhibit A** is Order re Plaintiff's Motion for Summary Judgment, *Recall Dunleavy v. Division of Elections*, 3AN-19-10903 CI (Alaska Super. Ct. Jan. 14, 2020).

3. **Exhibit B** is STWM's Motion for Stay Pending Expended Appeal (Corrected), *Recall Dunleavy v. Division of Elections*, 3AN-19-10903 CI (Alaska Super. Ct. Jan. 15, 2020).

4. **Exhibit C** is RDC's Opposition to STWM's Motion for Stay Pending Appeal, *Recall Dunleavy v. Division of Elections*, 3AN-19-10903 CI (Alaska Super. Ct. Jan. 21, 2020).

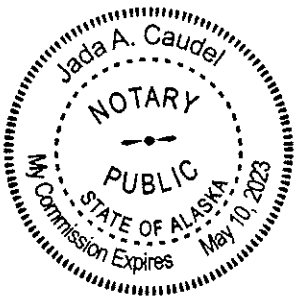
5. **Exhibit D** is STWM's Reply in Support of its Motion for Stay Pending Expedited Appeal, *Recall Dunleavy v. Division of Elections*, 3AN-19-10903 CI (Alaska Super. Ct. Jan. 23, 2020).

6. **Exhibit E** is Transcript of Oral Argument on Motion to Stay, January 29, 2020, *Recall Dunleavy v. Division of Elections*, 3AN-19-10903 CI (Alaska Super. Ct. Feb. 6, 2020).

Further affiant sayeth naught.

Brewster H. Jamieson

SUBSCRIBED AND SWORN TO this 7th day of February, 2020.




Notary in and for the State of Alaska
My commission expires: May 10, 2023

I certify that on February 7, 2019 a copy of
the foregoing was served by mail on:

S. Orlansky, Reeves Amodio LLC
500 L St, Ste 300, Anchorage, AK 99501

J. Lindemuth, S. Kendall, S. Gottstein
Holmes Weddle & Barcott, PC
701 W. 8th Ave., Ste. 700, Anchorage, AK 99501

J. Feldman, Summit Law Group
813 D St., Ste. 200, Anchorage, AK 99501

M. Paton-Walsh, Office of the Attorney General
1031 W 4th Ave, Ste 200, Anchorage AK 99501

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| RECALL DUNLEAVY, an unincorporated association<br><br>Plaintiff,<br>vs.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, AND GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS<br><br>Defendants. | |
| STAND TALL WITH MIKE, an independent expenditure group<br><br>Intervenor. | 3AN-19-10903 CI |

**Order Re:**

*I. Plaintiff's Motion for Summary Judgment*
*II. Defendant's Cross-Motion for Summary Judgment*
*III. Intervenor's Cross-Motion for Summary Judgment*

Plaintiff moves for summary judgment on the grounds that its recall application states proper grounds. Defendants State of Alaska, Division of Elections and Gail Fenumiai, Director, State of Alaska Division of Elections (Defendant) and Intervenor Stand Tall with Mike (Intervenor) each filed cross-motions for summary judgment on the grounds that the 200-word statement of the grounds for recall is not factually and legally sufficient. All parties agree that a motion for summary judgment is the proper procedural vehicle for the court to render a judgment on the issues presented. There is no dispute about which words in the application the Director of Elections rendered an opinion; there only remains a legal analysis of whether the grounds as stated in the application meet the

legal sufficiency required in AS 15.45.470-15.45.710.

The Court does not decide whether the allegations are true or not – that is the job of the voters. Neither does the Court weigh the allegations to determine whether an allegation, even if true, is a reason why the voters should or should not recall an elected official.

## Background

On September 5, 2019, a recall committee filed an application to recall Governor Michael J. Dunleavy. The application provides the following allegations as grounds for recall:

> Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:
> 1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
> 2. Governor Dunleavy violated Alaska law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.
> 3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
> 4. Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds.
>
> References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1-2, FSSLA19; OMB Change Record Detail (Appellate

Courts, University, AHFC, Medicaid Services).[1]

The Defendant denied certification of the recall application because "the statement of grounds for recall are not factually and legally sufficient for purposes of certification," but the Director found that the application met all other requirements of the statutes.[2] Plaintiff brought this case to challenge the decision.[3]

## Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact, and the case can be decided as a matter of law.[4] When reviewing the legal sufficiency of allegations in recall petitions, the court's approach is that of a motion to dismiss for failure to state a claim, and the court must construe the application liberally and accept the allegations as true.[5] Courts apply an "independent judgment" standard to issues of law and do not defer to the Director of Elections' decision.[6]

The Court will decide whether each allegation, if taken as true, supports one or more of the grounds provided by the Legislature.[7] The Court will review whether the law

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[1] "These references include: (1) the judicial appointment statute which Governor Dunleavy refused to follow; (2) a constitutional provision and statutes relating to Governor Dunleavy's unlawful partisan mailers and electronic advertisements, along with a specific related legislative legal opinion; (3) Governor Dunleavy's own explanation of his appellate court line-item veto; (4) Governor Dunleavy's June 28, 2019 vetoes, along with specific examples of their impacts on the health, education, and welfare of Alaskans; and (5) Governor Dunleavy's mistaken veto of Medicaid funds, and an explanation of his intended veto that shows his error." Pl.'s Reply in Supp. of Mot. for Summ. J. and Opp'n to Defs.'s and Interv.'s Cross-Mot. for Summ. J.s.

[2] Gail Fenumiai letter to Joe Usibelli Sr. on November 4, 2019 (denying certification for recall).

[3] The DOE denied certification of the recall application on November 4, 2019 "solely because the statement of grounds did not comply with the statutory requirements." Opp'n to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. n 15.

[4] See Christensen v. Alaska Sales & Serv., Inc., 335 P.3d 514, 516-21 (Alaska 2014).

[5] See von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd., 903 P.2d 1055, 1059 (Alaska 1995) (taking "the facts alleged in the first and fourth paragraphs as true and determine whether such facts constitute a prima facie showing of misconduct in office or failure to perform prescribed duties") (internal citations omitted).

[6] See Wielechowski v. State, 403 P.3d 1141, 1146 (Alaska 2017).

[7] See AS 15.45.570.

actually prohibits the alleged conduct.[8] To determine particularity and notice, the Court limited its review to the 200 words in the Plaintiff's application. The Court considered and discussed the Plaintiff's factual theories for each allegation only to provide context to the reader.

It is the Legislature's role, not the judiciary's, "to prescribe both the procedures and the grounds for recall. The political nature of the recall makes the legislative process, rather than judicial statutory interpretation, the preferable means of striking the balances necessary to give effect to the Constitutional command that elected officers shall be subject to recall."[9] Voters are the trier of fact, and "make their decision in light of the charges and rebuttals."[10]

## Discussion

### I. Applying the Particularity Requirement

Article XI of Section 8 of the Alaska Constitution states,

> All elected officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the Legislature.

The Alaska Legislature enacted AS 15.45.470-.700 and AS 29.26. 28-.360 to prescribe the specific processes to recall state and municipal elected officials respectively. Though the specific grounds for recall are different for state versus municipal officers, the

[8] See von Stauffenberg, 903 P.2d at 1060.
[9] Meiners v. Bering Strait Sch. Dist., 687 P.2d 287, 296 (Alaska 1984) ("Like the initiative and referendum, the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute").
[10] Id. at 301.

requirement for particularity within 200 words is the same.[11] The Alaska Supreme Court in Meiners and von Stauffenberg held that when reviewing a recall application, the statutes should be construed liberally and the allegations accepted as true, so as to protect the right of the people to vote and express their will.[12]

The Alaska Supreme Court decided Meiners and von Stauffenberg in 1984 and 1995 respectively. The Legislature re-visited the Title 15 recall statutes in 2000,[13] 2005,[14] and 2006,[15] but has neither rejected, explicitly or implicitly, the Alaska Supreme Court's interpretation of the recall statutes.

This Court is obligated to faithfully interpret and apply the Alaska Constitution and the laws of this state as created by the Legislature. This Court declines the invitation of the Attorney General and the Intervenors to expand the holding of Meiners and von Stauffenberg contrary to the Legislature's implicit adoption of those holdings. Further, this Court declines to restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office as voters have a right to do so through the initiation, referendum, and recall process.

AS §15.45.550 provides bases of denial of certification. AS 15.45.500(2) requires that "the grounds for recall [be] described *in particular* in not more than 200 words" (emphasis added). The Alaska Supreme Court confirmed in both Meiners and von Stauffenberg that the particularity requirement is effectively a notice pleading standard

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[11] Compare AS 15.45.500(2) ("described in particular"), with AS 29.26.260(a)(3) ("stated with particularity").
[12] See von Stauffenberg, 903 P.2d at 1057; Meiners, 687 P.2d at 291.
[13] See SLA 2000, ch. 21, § 59.
[14] See 1st Sp. Sess. 2005, ch. 2, § 46.
[15] See ch. 38, § 5, eff. May 19, 2006.

with "[t]he purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct."[16] The standard for particularity is "whether a particular alleged act 'is not [so] impermissibly vague' that the official cannot respond."[17]

## II. Interpreting the relevant grounds for recall

There have been several Alaska Superior Court decisions that have defined the grounds for recall for state elected officials. AS 15.45.510 establishes four grounds for recall: (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption. Alaska Superior Court judges have consistently treated the Alaska Supreme Court's recall decisions regarding local officials to be controlling for recall applications of statewide officials.[18]

In Coghill, decided in 1993, the Court defined the term "incompetence." In Valley Resident, decided in 2004, the Court defined "lack of fitness" and "neglect of duties." In Citizens, decided in 2006, the Court defined "lack of fitness" in alignment with Valley Resident.

As discussed previously, the Alaska Legislature affirmatively reviewed and made amendments within the Title 15 recall statutes, but did not make any changes to or define the recall grounds as stated in AS 15.45.510. This Court interprets the Legislature's silence post-decision in Coghill, Valley Residents, and Citizens as the Legislature's acceptance and approval of the definitions used by the courts.

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[16] Meiners, 687 P.2d at 302.
[17] Id.
[18] See Coghill v. Rollins, Memorandum Decision, No. 4FA-92-1728CI (Alaska Super., 14, 1993) (Savell, J.); Valley Residents for a Citizen Legislature v. State, Order Regarding Pending Motions, No. 3AN-04-6827CI (Alaska Super., Aug. 24, 2004) (Gleason, J.) (Appendix B); Citizens for Ethical Government v. State, Transcript of Record, 3AN-05-12133CI, at 5-6 (Stowers, J.).

### 1. Lack of fitness

In Valley Residents, the court defined the statutory recall ground, "lack of fitness" as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office."[19] The target for recall, Senator Ogan allegedly promoted his employer in legislative committee through his voting, and failed to recognize an obvious conflict between his respective duties to his employer and to his constituents. The Court found that the stated ground for recall was legally sufficient because it alleged a violation of the Legislative Ethics Act.

The definition applied by the Court in Valley Residents is logical and would give an elected official reasonable notice. This court finds that "suitability for office" can describe the person's ethical and moral fitness for the office. Including ethical and moral fitness is consistent with the oath of office every public officer must take – to faithfully discharge his duties.[20]

Defendant and Intervenor argue that "unsuitability for office" "is so vague and subjective that it would amount to the kind of purely political, no-cause-required recall that the constitutional delegates expressly rejected."[21] While "unsuitability" is a broad term, when connected to specific conduct as alleged, it is sufficient to place the elected official on notice to defend against the allegations.

Defendant's suggestion to define "lack of fitness" in terms of mental or physical

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[19] Valley Residents, Order Regarding Pending Motions, at *10; see also Citizens, Transcript of Record at 5-6, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (defining lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office") (Appendix C); Coghill, Memorandum Decision, No. 4FA-92-1728 CI (Alaska Super. Sept. 14, 1993).

[20] See also, Alaska Const. art. III, § 16 ("The governor shall be responsible for the faithful execution of the laws").

[21] See Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 28.

ability, as in Alaska's Business and Professions Code is problematic.[22] "Recall applications are intended to be easy for laypeople to prepare without lawyer assistance."[23] Furthermore, there are other processes in place to remove a governor from office based on mental or physical ability.[24] Last, the Legislature has declined to adopt the Business and Professions Code definition and this Court declines to further restrict the meaning of a definition that the Legislature has implicitly approved.

This Court will apply the "lack of fitness" definition applied in the Valley Residents decision and accepted by the Legislature. The Court considers an official's ethical and moral fitness to fall within the term "suitability."

**2. Incompetence**

In Coghill v Rollins, the Court defined "incompetence" in Title 15 as "lack of [the] ability to perform the official's required duties."[25] Lieutenant Governor Coghill was alleged to be unfamiliar with Alaska's election code despite overseeing elections, and therefore the Court concluded that the allegation of incompetence was legally sufficient.[26] On a moot appeal, the Alaska Supreme Court declined to address the definition of "incompetence."

Defendant and Intervenor suggested additional requirements of harm or multiple acts. That type of information, while relevant, goes to the weight of the evidence rather

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[22] See Att'y Gen. Clarkson Op. at 15-16 (Exhibit 2).
[23] See Meiners, 687 P.2d at 301.
[24] See, e.g., Alaska Constitution Art. III, sec. 12 ("Whenever for a period of six months, a governor has been . . . unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant").
[25] Coghill, Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) (Appendix D).
[26] Id. at 22.

than to clarify whether the official, as measured by his/her act or inaction, lacked the ability required. If an official is alleged to have failed to perform a duty or has done so poorly, the nature of the failure or the quality of the work is up to the voters to weigh. Additionally, in Coghill, the mere allegation that Lieutenant Governor was unfamiliar with the law he was charged with administering was adequate to establish a ground for recall due to incompetence.[27] In other words, harm was not required to show incompetence.

The Court declines to expand or restrict the definition of "incompetence" when the Legislature has declined to do so. The Court will apply the same definition as used in the Coghill decision.

**3. Neglect of duty**

In Valley Residents, the Court defined "neglect of duty" as "the nonperformance of a duty of office established by applicable law."[28]

In this case, Defendant compared "neglect of duty" to the concept of "nonfeasance," which Minnesota, Virginia, and Washington have defined to require an intentional act.[29] Defendant compared neglect of duty to violating one's oath of office.[30] Additionally, Defendant distinguished between trivial and non-trivial errors and omissions.[31] While these arguments are reasonable, this Court does not have the

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[27] Id. at 24-25.
[28] Valley Residents, Order Regarding Pending Motions, at 9.
[29] See, e.g., No. AGO No. 2019200686, 2019 WL 5866609, at *7 (Alaska A.G. Nov. 4, 2019) (citing MN ST § 211C.01(2); In re Proposed Petition to Recall Hatch, 628 N.W.2d 125, 128 (Minn. 2001); Chandler v. Otto, 693 P.2d 71, 73-74 (Wash. 1984); Warren v. Commonwealth, 118 S.E.2d 125, 126 (Va. 1923)).
[30] See id.
[31] See id.

discretion to create a more stringent definition than has already been used by the courts, and the Legislature has accepted. As Plaintiff suggests, "it is up to the voters to decide whether a particular failure to act constitutes neglect of duty sufficient to warrant removal from office."[32]

This Court will use the definition of "neglect of duties" as applied in the Valley Residents decision and not rejected by the Legislature.

## III. Which, if any, of the five allegations are sufficient to go to a vote?

Plaintiff argues three grounds for recall: (1) lack of fitness, (2) incompetence, and (3) neglect of duties.[33] The grounds for recall that are sufficient "must be set forth on the ballot in full, as contained in the petition, without revision."[34]

1. **Allegation:** "Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations."

The Constitution states: "The governor shall fill any vacancy in an office of . . . superior court judge by appointing one of two or more persons nominated by the judicial council."[35] AS 22.10.100 codifies this duty and provides: "The governor shall . . . appoint a successor to fill an impending vacancy in the office of superior court judge within 45 days after receiving nominations from the judicial council."[36] The Governor has discretion over whom, but not whether to appoint a new judge, nor does the Governor

[32] Pl.'s Mot. for Summ. J. 12.
[33] The Supreme Court of Alaska has not yet defined these grounds.
[34] Meiners, 687 P.2d at 303.
[35] Alaska Const. art. IV, § 5.
[36] AS 22.10.100(a).

have the discretion to exceed the 45 day deadline.

Plaintiff alleges that Governor Dunleavy failed to fill a judiciary seat in Palmer Superior Court within the 45 days prescribed by law.[37]

Governor Dunleavy had a legal duty to select a candidate within the time prescribed by the Legislature. If the allegations are true, his failure to select a candidate by the prescribed date could demonstrate to a voter that: he "lacks fitness" because he did not obey the law; that he is "incompetent" because he did not understand his duty to conduct his due diligence on the candidates or process before the expiration of the statutory deadlines; and/or that he "neglected his duty" because he failed to appoint a new judge within the time given by statute. This allegation is legally sufficient.

2. **Allegation:** "Governor Dunleavy violated Alaska law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters."

Plaintiff alleges that Governor Dunleavy allowed the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers.[38]

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[37] The Plaintiff provided additional information within their briefing. The Alaska Judicial Council processed and vetted 13 applications for the positions and nominated three candidates. Those candidates' names were transmitted to Governor Dunleavy on February 4, 2019, thus giving the Governor until March 21, 2019 to select two of the three candidates. Governor Dunleavy allegedly appointed the final nominee to the position on April 17, 2019, 72 days after the Council forwarded its list of nominees. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[38] The Plaintiff provided additional information within their briefing. Plaintiff alleges that Governor Dunleavy has spent $18,902, $8,173, and $3,312, of public funds on partisan advertising through three Facebook pages entitled "Restore the PFD," "Repeal SB91," and "Cap Government Spending," respectively. These pages allegedly include advertisements that attack politicians who disagreed with Governor Dunleavy, support politicians that have favored

Plaintiff argues that Governor Dunleavy's conduct violated the Executive Branch Ethics Act, Alaska's campaign finance laws, and article IX, section 6 of the Alaska Constitution. AS 39.52.120(b) ("The Executive Branch Ethics Act") provides, in relevant part:

> A public officer may not . . .
> use or authorize the use of state funds . . . for partisan political purposes. . .
> [I]n this paragraph, "for partisan political purposes"
> (A) means having the intent to differentially benefit or harm a
> (i) candidate or potential candidate for elective office; or
> (ii) political party or group;
> (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

Plaintiff argues that Governor Dunleavy's actions constitute a violation of the Ethics Act because they were intended "to differentially benefit or harm" specific candidates, potential candidates, or political groups, instead of intending to "benefit the public interest at large."[39]

Alaska's campaign finance laws require: (1) a clear indication of who paid for a communication;[40] (2) specific language distancing an independent group from a particular candidate;[41] and (3) prior registration with APOC.[42]

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these campaigns, and promote Governor Dunleavy personally. Additionally, Governor Dunleavy's office has allegedly admitted to spending approximately $3,500 of public funds to print and distribute "campaign-style literature" supporting particular politicians who voted for positions that Governor Dunleavy favors, without disclosing who paid for them. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[39] See AS 39.52.120(b)(6); see also Memorandum from Daniel C. Wayne, Legislative Counsel, Legislative Affairs Agency, Div. of Legal & Research Servs., to Rep. Zack Fields, at 4 (May 20, 2019) ("[T]he use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties") (Exhibit 13).

[40] AS 15.13.090(a).

[41] AS 15.13.135(b).

[42] AS 15.13.050(a). The Plaintiff provided additional fact allegetaions, considered by the Court only to understand the Plaintiff's theory of the allegation. Plaintiff argues that Governor Dunleavy's conduct violate Alaska's campaign finance laws because neither the mailers nor the Facebook ads clearly identified who paid for the

If the allegations are true, Governor Dunleavy's conduct could constitute a violation of the law, which would constitute neglect of duty. If he understood the laws, and chose to ignore the laws, the act could establish a lack of fitness. On the other hand, if he did not intend to violate the law or did not understand the law, the allegations, if true, could establish his incompetence. The facts and conclusions, therefore, are left to the voters to decide. This allegation is legally sufficient.

3. **Allegations:** "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to . . ."

   i. "(a) attack the judiciary and the rule of law."

The Constitution for the State of Alaska is divided into separate Articles for the Legislature, Executive and Judicial branches. Implicitly, this State recognizes the separation of powers doctrine.[43] The Alaska Supreme Court has relied upon the existence of that doctrine in making a number of holdings, which have resulted in protecting the authorities reserved for the Executive or Legislative branches.[44] The Constitution grants the Judicial Branch all judicial powers, which necessarily includes interpreting the Alaska Constitution.[45]

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communications or stated that Governor Dunleavy was not acting on behalf of the candidate's campaign. Additionally, Governor Dunleavy allegedly did not register with APOC in advance of distributing these communications.

[43] See, e.g., Bradner v. Hammond, 553 P.2d 1, 5 n.8 (Alaska 1976) (citing Myers v. United States, 272 U.S. 52 (1926)) (prohibiting one branch "from encroaching upon and exercising the powers of another branch").

[44] See, e.g., Pub. Def. Agency v. Superior Court, Third Judicial Dist., 534 P.2d 947, 951 (Alaska 1975) ("When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers"); Rust v. State, 582 P.2d 134, 138 (Alaska 1978), on reh'g, 584 P.2d 38, n.11 (Alaska 1978) ("Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine").

[45] Alaska Const. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature"); see also ACLU v. Dunleavy, Order Denying Motion to Dismiss, 3AN-19-

Article XII, Section 5 requires each public officer to take an oath of office. That oath requires the officer to support and defend the Constitution of the State of Alaska and to faithfully discharge their duties.

Plaintiff alleges that after Governor Dunleavy prepared a proposed budget for FY 2020, which he submitted to the Legislature, the Alaska Supreme Court issued its decision in State v. Planned Parenthood of the Great Northwest,[46] which held unconstitutional a regulation and statute that limited the availability of Medicaid funding for medically necessary abortions. When Governor Dunleavy issued his line-item vetoes to the appropriations bill passed by the Legislature, he allegedly reduced the funding to the appellate courts to provide $334,700 less than he had originally proposed and that the Legislature had approved. If the allegation stopped here, the veto was within the Governor's discretion and, therefore, not a violation of his duties. As such, it could not be a grounds for recall.[47]

However, Plaintiff further alleges that Governor Dunleavy explained his veto as reflecting his "oppos[ition] to State funded elective abortions. . . The annual cost of elective abortions is reflected by this reduction."[48] Plaintiff alleges that the veto message demonstrates an attempt by Governor Dunleavy to influence and undermine the judicial branch's independence.

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08349CI, at 8-10 (Alaska Super. Dec. 12, 2019) (ruling that courts may review executive vetoes for constitutional compliance and not necessarily dismiss on political question grounds").

[46] 436 P.3d 984 (Alaska 2019).

[47] See von Stauffenberg, 903 P.2d at 1060 ("elected officials cannot be recalled for legally exercising the discretion granted to them by law").

[48] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS at 122 (June 28, 2019) (Exhibit 14).

If the allegations are true, Governor Dunleavy breached his oath of office to defend the Constitution by attempting to infringe upon the powers reserved to the Judicial branch, thus constituting a neglect of duties. If true that Governor Dunleavy attempted to influence or undermine the independence of the judiciary, his actions could constitute a lack of fitness. Last, if Governor Dunleavy was unaware of his duty to not encroach upon the powers of another branch, that could constitute "incompetence." This allegation is legally sufficient.

ii. "(b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities."

Plaintiff alleges that after the Legislature completed its annual budget process for FY 2020, Governor Dunleavy line-item vetoed approximately $440 million, on top of $270 million in cuts already included in the appropriations bill, for a total of 182 specific programs vetoed spanning health, education, and welfare. After failing to override Governor Dunleavy's vetoes in a 37-1 vote, the Legislature passed a new appropriations bill to restore most of the vetoed funds. Governor Dunleavy line-item vetoed the second appropriations bill by $220 million.

The Alaska Constitution, unlike the United States Constitution, provides affirmative rights to its citizens in the areas of health,[49] education,[50] and welfare.[51] The Alaska Supreme Court has not defined these rights, but has recognized that "the Legislatures do not have to fund or fully fund any program (except, possibly,

[49] Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health").
[50] Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State").
[51] Alaska Const. art. VII, § 5 ("The legislature shall provide for public welfare").

constitutionally mandated programs)".[52]

Plaintiff argues that because the Legislature has a constitutional duty to provide for the health, education, and welfare of Alaska's citizens, the Governor cannot wield his veto power to preclude the Legislature from fulfilling that duty. Plaintiff argues that Governor Dunleavy went beyond the legitimate exercise of his veto power and breached his duty to respect the Legislature's role to fund core government services. Plaintiff argues that voters should decide the level of harm due to the incompetently reduced budgets.

Governor Dunleavy has the Constitutional authority to veto bills passed by the Legislature.[53] The Governor has broad discretion when exercising his line-item veto authority, but the Legislature always maintains the ability to override a Governor's veto.[54] As such, a Governor can never prevent the Legislature from fulfilling its Constitutional duties with his/her veto power.[55] This allegation, even if true, cannot establish grounds for recall based on a lack of fitness, incompetence, or neglect of duty.

4. **Allegation:** "Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the Legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds."

Plaintiff alleges that Governor Dunleavy vetoed significantly more Medicaid

[52] Simpson v. Murkowski, 129 P.3d 435, 447 (Alaska 2006).
[53] Alaska Const. Art. II, §15 ("The Governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin").
[54] See Alaska Const. Art. II, §16.
[55] Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 51.

funds than he intended. He allegedly intended to veto $27,004,500 of funding for adult dental benefits, but miscalculated due to his misunderstanding of the federal matching rate.[56] He explained that he kept "$18,730,900 in [state] general funds that . . . [he] never intended to be vetoed" in June 2019.[57] It is alleged that this mistake would have equated to roughly a $40 million loss of federal funds.

A mistake can be a measure of competence.[58] Governor Dunleavy's alleged mistake, if true, could be interpreted as "incompetence." Voters have the right to weigh the seriousness and circumstances of the alleged mistake.

**Conclusion**

This decision best preserves the right of the voters. The Alaska Constitution gives the voters great power to act independently of their elected officials. Initiative and referendum powers allow the public to legislate and veto laws regardless of what the Legislature and Governor may say or want. Similarly, the recall process allows the voters to step in and replace an elected official before the end of their elected term.

Defendant's and Intervenor's arguments have a basis in law and logic, but would significantly limit the recall power of the public as granted by the Legislature. This Court declines to usurp the authority vested in the Legislative branch by our Constitution to prescribe the recall process. If the Legislature determines that this Court's decision places too great of a burden on an elected official to defend their exercise of discretion as

[56] Calculations explained at Motion for Summary Judgment 50.
[57] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HB 2001 FY20 Post-Veto Change Record Detail at 27 (Aug. 19, 2019) (Exhibit 18).
[58] See also Meiners, 687 P.2d at 294 ("[T]here is no doctrine that 'substantial compliance' with the procedures is sufficient and that technical errors will be overlooked after-the-fact").

granted them by their office, it is the Legislature that has the authority to create more protective rules for elected officials, not the Court.

This Court reverses the Director of Elections' decision to reject the recall application, except for allegation 3(b), which shall be struck. The third allegation in the recall petition shall be changed to: "(3) Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law."[59] Each of the remaining allegations is legally sufficient and is stated with particularity such that the elected official can adequately respond to the allegations.

The Director of Elections shall certify the remaining recall application pursuant to AS 15.45.540 and shall prepare the petitions as required by AS 15.45.560. The petitions shall be prepared and issued to the applicants no later than February 10, 2020, unless that date is stayed by the Alaska Supreme Court.

Plaintiff's motion for summary judgment is granted in part and denied in part. Defendant's and Intervenor's cross-motions for summary judgment are denied in part and granted in part.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 14th day of January, 2020.

I certify that on 1/14/2020 a copy of the following was mailed/emailed to each of the following at their addresses of record.
S. Orlansky; J Feldman; S Gottstein; S Kendall; J Leidemuth; M Paton-Walsh; C Richards; M Bayless; B. Jamieson
Administrative Assistant

ERIC A. AARSETH
Superior Court Judge

[59] The deletion of the "(a)" and replacing the semi-colon with a period do not change the meaning of the allegation.

Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022
LANE POWELL LLC
1600 A Street, Suite 304
Anchorage, Alaska 99501
Telephone: 907-264-3325
907-264-3303
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Craig Richards, ABA No. 0205017
LAW OFFICES OF CRAIG RICHARDS
810 N Street, Suite 100
Anchorage, Alaska 99501
Telephone: 907-306-9878
crichards@alaskaprofessionalservices.com

Attorneys for Intervenor Stand Tall With Mike

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| RECALL DUNLEAVY, an unincorporated association,<br>Plaintiff,<br>v.<br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS,<br>Defendants,<br>STAND TALL WITH MIKE, an independent expenditure group,<br>Intervenor. | Case No. 3AN-19-10903 CI<br>**STWM'S MOTION FOR STAY PENDING EXPEDITED APPEAL**<br>(CORRECTED) |

COMES NOW, Intervenor Stand Tall With Mike ("STWM"), by and through counsel, and moves this Court to stay its order pending the outcome of STWM's appeal to the Alaska Supreme Court.

## I. INTRODUCTION

Alaska's system of recall for cause hangs in the balance in the case. If this Court's order is affirmed, Alaska's recall system is effectively transformed from a "for cause" recall process to a purely political recall process. But affirmance is uncertain or unlikely, and the stakes warrant a stay of this Court's order. A stay would permit the Alaska Supreme

Court to construe—for the first time—the statutes providing for recall of state officers and determine the nature of the recall process in Alaska. That court should have the chance to determine whether Recall Dunleavy's ("RDC") recall petition is sufficient under existing law or improperly subjects Governor Dunleavy to recall "for legally exercising the discretion granted to [him] by law."[1]

## II. ARGUMENT

### A. Standard

"[T]he superior court has discretion to grant a stay concerning a non-monetary judgment."[2] The court's discretion is "guided by 'the public interest,'"[3] and the standard for granting a stay resembles the standard for granting a preliminary injunction.[4] Where only the party seeking the stay faces irreparable harm, "it will ordinarily be enough that the [party] raised questions goin[g] to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."[5] But if the party seeking a stay "does not stand to suffer irreparable harm, or where the party against whom the [stay] is sought will suffer injury if the [stay] is issued," the party seeking the stay must show "probable success on the merits" [6] "If the latter part of this standard comes into play, the court is to use a 'balance of hardships' approach. . . . weigh[ing] 'the harm that will be suffered by [one party] if a[] [stay] is not granted, against the harm that will be imposed upon the [other party] if the [stay] is granted."[7]

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[1] *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

[2] *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1249 (Alaska 1995).

[3] *Id.*

[4] *See Id.* (holding that the test presented in *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 197), applies).

[5] *A.J. Indus.*, 470 P.2d at 540 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 260 F.2d 738, 7640 (2d Cir. 1953)).

[6] *Id.* (footnotes omitted).

[7] *Keane*, 893 P.2d 1250 n.22.

STWM is the only party likely to suffer irreparable harm and must show only that it raises "a fair ground for litigation."[8] But STWM is also likely to succeed on the merits, and even if RDC faces irreparable harm, its harm from delay is less than STWM's harm from a hasty implementation of the Court's order.

**B. STWM Is the Only Party Likely to Suffer Irreparable Harm.**

STWM members will suffer three species of irreparable harm if the Court's order is not stayed pending appeal.

First, STWM's members will be called upon to defend the Governor against all twelve charges the Court held legally sufficient.[9] Because the Governor may not place his rebuttal statement before voters at the petition stage,[10] STWM's members must spend their time and money communicating with voters about the recall petition's deficiencies. Their efforts (money and individual volunteer efforts) will be irreparably diluted and rendered futile if they must expend resources contesting charges that the supreme court ultimately holds to be invalid. There is no remedy by which STWM can recover those resources—particularly the time and volunteer efforts.

Second, STWM's members face irreparable harm if the Governor is distracted from implementing the agenda that drew votes from 145,000 Alaskans (including STWM's members) during the last general election. STWM's members campaigned for the Governor's election because they believed in his platform. If the Governor faces a recall campaign, he will be less able to focus on fulfilling his campaign promises while defending against this recall effort. STWM's members will not be able to recover the lost chance to put the state on a firmer fiscal footing. This is all the more true if the recall election is called and the Governor removed from office before the supreme court can rule. Alaska law

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[8] *Id.*

[9] While four of RDC's "bullet points" remain, the "and/or" clause was maintained, meaning the Governor is forced to defend himself against 12 individual charges in 200 words or less, plus mount an expensive statewide campaign barely a year after taking office.

[10] *See* AS 15.45.680.

favors "electoral repose,"[11] and a completed recall election could moot STWM's important constitutional and statutory arguments.

Third, STWM's members—along with all Alaskans—face irreparable harm if Alaska's system of recall for cause is supplanted by recall procedures that permit vague charges aimed at officeholders' exercise of lawful discretion. RDC's recall application differs from the applications other courts have considered in alleging grounds that impinge on a governor's discretion. If an election is held, future governors and other state officials may hesitate to use the power of their offices to rein in spending or take other necessary actions, and voters will regard general elections as contingent decisions subject to the continuous threat of recall whenever the political winds change.

In seeking to avoid this irreparable harm, STWM's members also vindicate the interests of Alaskan voters in an orderly recall process. As explained below, the supreme court is likely to hold insufficient at least one of the twelve charges this Court approved. If that decision comes during or after the signature gathering effort, voters will be asked to either re-sign the finally-approved version of the recall petition, or RDC will seek to have the already-collected signatures based on a flawed petition counted toward the required number. This will set the table for more legal disputes, create confusion among the signers and the voting public, and erode the credibility and integrity of the recall process. Such a result does not accord with Alaska's orderly process of recall for cause. It is better for all to measure twice and cut once.

By contrast, RDC faces no irreparable harm from a stay. It need only gather signatures and file its petition before the last 180 days of the Governor's term.[12] A delay to ensure the recall charges satisfy the law will not make it harder for RDC to gather signatures. Surely, signature-gathering is easier in April or May than in February. If the charges are certified at the direction of the supreme court—and if RDC can gather signatures for the certified charges— the Division of Elections must hold a special election

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[11] *See von Stauffenberg*, 903 P.2d at 1058 (referring to municipal elections).

[12] *See* AS 15.45.610; AS 15.45.630(2).

"not less than 60 days, nor more than 90 days," after determining that the petition was properly filed.[13] If a general or primary election falls within the statutory time period for holding a special election, the "special election shall be held on the date of the primary or general election."[14] Presumably, RDC wishes the greatest number of voters to participate in a recall election and seeks to submit its recall to voters at a regularly scheduled election. STWM is prepared to press its appeal on an expedited schedule that will permit RDC to submit any recall effort (assuming it is able to gather signatures for it) during one of the two already-scheduled statewide elections in 2020 (the August primary, or the November general elections).

**C. STWM Is Likely to Prevail on the Merits.**

STWM need only show that it raises a serious issue on appeal.[15] It does so because it is likely to prevail on the merits of its appeal. As STWM argued to this Court, *Meiners v. Bering Strait School District*[16] does not control this case.[17] *Meiners* addressed a different practical and statutory context. And it was eroded by the Alaska Supreme Court's decision in *von Stauffenberg v. Committee for an Honest and Ethical School Board.*[18] Accordingly, *Meiners* provides no basis for certifying a political recall application that alleges only vague and conclusory grounds, nearly all of which represent policy differences with the Governor. RDC's application must meet the statutory criteria in AS 15.45.510, and following *von Stauffenberg*, the recall application must avoid targeting the lawful exercise of the Governor's discretion.[19] As STWM has explained at length in its briefs, RDC's application falls short.

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[13] AS 15.45.650.

[14] AS 15.45.650.

[15] *Id.*

[16] 687 P.2d 287 (Alaska 1984).

[17] *See* STWM Mot. Summ. J. at 15; STWM Reply at 7–8.

[18] 903 P.d 1055 (Alaska 1995); *see* STWM Mot. Summ. J. at 11–12; STWM Reply at 7–8.

[19] *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

The Court found STWM's arguments unpersuasive. The supreme court has not expressly overruled *Meiners*, and this Court considered itself bound by that ruling. But STWM will likely succeed on appeal. The supreme court has addressed *Meiners* in a recall case only once in the thirty-five years since it was decided, and in doing so, failed to re-state *Meiners*'s permissive standard. This case presents an opportunity for the supreme court to clarify that *von Stauffenberg*'s protections for officeholders' lawful discretion control over *Meiner*'s solicitude for under-resourced voters attempting to recall a town official. In light of the differences between Title 15 and Title 29, the practical differences between this recall effort and the recall effort in *Meiners*, the supreme court's tepid treatment of *Meiners* in *von Stauffenberg*, and the vagueness of RDC's stated grounds, the supreme court will hold insufficient one or all of RDC's grounds for recall.

## III. CONCLUSION

STWM will suffer irreparable harm if RDC's recall application is certified while this case is pending on appeal. Because STWM raises a serious issue on appeal—and is likely to prevail—the Court should stay its order pending resolution of this weighty case in the Alaska Supreme Court.

DATED this 15th day of January, 2020.

LAW OFFICES OF CRAIG RICHARDS

By _____
Craig Richards, ABA No. 0205017

and

LANE POWELL LLC

By _____
Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022

Attorneys for Intervenor Stand Tall With Mike

I certify that on January 15, 2020, a copy of the foregoing was served by email, per court order, on:

S. Orlansky, Reeves Amodio LLC
susano@reevesamodio.com

J. Lindemuth, S. Kendall, S. Gottstein
Holmes Weddle & Barcott, PC
jlindemuth@hwb-law.com; smkendall@hwb-law.com;
sgottstein@hwb-law.com

J. Feldman, Summit Law Group
jefff@summitlaw.com

M. Paton-Walsh, Office of the Attorney General
Margaret.Paton-Walsh@alaska.gov

C. Richards, Law Offices of Craig Richards
crichards@alaskaprofessionalservices.com

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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|---|---|
| RECALL DUNLEAVY, an unincorporated association,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS,<br><br>Defendants. | Case No. 3AN-19-10903 CI |
| STAND TALL WITH MIKE, an independent expenditure group,<br><br>Intervenor. | |

**PLAINTIFF'S OPPOSITION TO STWM'S MOTION FOR STAY PENDING APPEAL**

This court ordered the Division to provide petition booklets to Plaintiff by no later than February 10, 2020, so that Plaintiff can begin collecting the more than 71,0000 signatures needed to cause a recall election. Intervenor Stand Tall With Mike ("STWM") seeks a stay of that order pending appeal, arguing it will face irreparable harm if a stay is not entered. The motion should be denied. STWM faces no irreparable harm if Plaintiff begins gathering signatures. On the other hand, a stay would cause irreparable harm to Recall Dunleavy, and STWM cannot show a clear probability of success on the merits. Thus, this court should promptly deny the stay request.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

## I. BACKGROUND

Plaintiff filed its application to recall Governor Michael J. Dunleavy with the Division of Elections on September 5, 2019.[1] The Director of the Division of Elections, relying on the opinion of Attorney General Kevin Clarkson, refused to certify the application.[2]

Recall Dunleavy filed this lawsuit the following day, November 5, 2019.[3] In seeking expedited consideration,[4] Recall Dunleavy pointed out that, "every day of delay denies the citizens of Alaska the opportunity to lawfully exercise their right to recall . . . as guaranteed by article XI, section 8 of the Alaska Constitution."[5]

At oral argument on January 10, this court determined that one factual allegation should be struck from Plaintiff's recall application, and otherwise the recall application

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1 *See* Letter from Att'y Gen. Kevin G. Clarkson to Gail Fenumiai, Dir. of Elections, *Review of Application for Recall of Governor Michael J. Dunleavy*, at 1 (Nov. 4, 2019) [hereinafter Att'y Gen. Clarkson Op.] (Exhibit 2 to Plaintiff's Motion for Summary Judgment (Nov. 27, 2019) [hereinafter Plaintiff's S.J. Mot.]).

2 *See* Att'y Gen. Clarkson Op. at 1 (Exhibit 2 to Plaintiff's S.J. Mot.).

3 *See* Plaintiff's Complaint (Nov. 5, 2019).

4 Plaintiff's Motion for Briefing and Decision Schedule (Nov. 6, 2019); *see also* Plaintiff's Emergency Motion for Expedited Scheduling Conference to Address Briefing and Decision Schedule (Nov. 5, 2019) [hereinafter Plaintiff's Emergency Mot.]; Affidavit of Jahna M. Lindemuth (Nov. 5, 2019).

5 Plaintiff's Emergency Mot. at 2.

should have been certified.[6] This court ordered the Division of Elections to prepare and issue recall petitions to Plaintiff "no later than February 10, 2020."[7]

After issuing its oral decision, this court indicated that it would not be inclined to grant a stay, and that a request for a stay, if any, should be made to the Alaska Supreme Court.[8] STWM never conferred with Recall Dunleavy on whether Plaintiff would non-oppose a motion for stay filed in the first instance with the Alaska Supreme Court.

## II. STANDARD OF REVIEW

Alaska Civil Rule 62 gives this court the ability to grant a stay pending appeal.[9] "In considering whether to grant [a stay], the [superior] court must consider criteria much the same as it would in determining whether to grant a preliminary injunction."[10]

Preliminary injunctions may be ordered when a party meets "either the balance of hardships or the probable success on the merits standard."[11] Under the balance of

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6 *See* Order re: Plaintiff's Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Intervenor's Cross-Motion for Summary Judgment at 18 (Nov. 14, 2019) [hereinafter S.J. Order].

7 *Id.*

8 *Id.* ("The [recall] petitions shall be prepared and issued to the applicants no later than February 10, 2020, unless that date is stayed *by the Alaska Supreme Court.*" (emphasis added)).

9 Alaska R. Civ. P. 62(d). The State would not need to provide any bond or other security as part of a stay. *See* R. 62(e). But STWM could be ordered to provide a supersedeas bond. *See* R. 62(d).

10 *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1973) (citing 7 J. Moore, Federal Practice 62.05, at 62-24 (2d ed. 1972)).

11 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *A. J. Inds., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971)).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

hardships test, courts must balance "the harm [a party] will suffer without the injunction against the harm the injunction will impose on the [other party.]"[12] A stay "is warranted under [the balance of hardships] standard [only] when . . . : '(1) the [moving party is] . . . faced with irreparable harm; (2) the opposing party [is] . . . adequately protected; and (3) the [moving party] . . . raise[s] serious and substantial questions going to the merits of the case . . . ."[13]

But "where one party will invariably see unmitigated harm to its interests,"[14] courts must instead apply "the probable success on the merits test."[15] For the probable success on the merits standard, courts are directed to apply "the heightened standard of a '*clear* showing of *probable* success on the merits.' "[16]

## III. ARGUMENT

### A. Recall Dunleavy Would Suffer Irreparable Harm From A Stay Precluding It From Collecting Signatures While An Appeal Is Pending.

STWM argues that this court should review its request for a stay pending appeal under the less stringent "balance of hardships" test.[17] STWM is incorrect because,

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12 *Id.*(citing *A. J. Inds.*, 470 P.2d at 540).

13 *Id.* (quoting *State v. Kluti Kaah Native Vill. Of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992)).

14 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979 (Alaska 2005).

15 *Alsworth*, 323 P.3d at 54 (citing *Metcalfe*, 110 P.3d at 979).

16 *Metcalfe*, 110 P.3d at 978 (emphasis added) (quoting *Kluti Kaah Native Vill. Of Copper Ctr.*, 831 P.2d at 1272).

17 *See* STWM's Motion for Stay Pending Expedited Appeal at 2-3 (Jan. 15, 2020) [hereinafter STWM's Mot. for Stay].

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

contrary to STWM's assertions, Recall Dunleavy would face irreparable harm from any further delay in its ability to collect signatures to cause a recall election as soon as possible.

46,405 qualified Alaskans signed the recall application that this court determined was valid and that the Defendants wrongfully denied. The citizens have a constitutional right to recall the Governor, and now that the application has been certified, the next phase is the collection of more than 71,000 signatures. The process is intended to move quickly. When the next round of signatures is submitted, the Division has just 30 days to validate the signatures.[18] The Division then *must* schedule a recall election within 60 to 90 days of the next round of signatures being validated.[19] Only if a primary or general election is scheduled during that window may the Division avoid scheduling a separate special election.[20]

If the recall application had been lawfully certified on November 4, 2019, the day of the unlawful denial, Plaintiff expects it could have submitted sufficient signatures by the end of 2019, causing a recall election to be scheduled in early spring.[21] Alaskans could then have had a different governor address the legislature's budget and other laws proposed during this upcoming session. Any and all delay in the recall process irreparably

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18 AS 15.45.620.
19 AS 15.45.650.
20 AS 15.45.650.
21 Plaintiff collected the signatures required for its recall application in approximately five weeks.

harms the rights of the citizens of the State of Alaska to cause a recall election. Nothing other than the timely distribution of recall petition booklets could adequately protect Recall Dunleavy's interests.

Because Recall Dunleavy would be harmed by an additional stay, this court should more appropriately analyze STWM's request under "the probable success on the merits test."[22]

**B. STWM Will Not Suffer Irreparable Harm.**

STWM makes specious and speculative arguments that it will be irreparably harmed if a stay is not entered.[23] The overarching answer to STWM's concerns is an expedited appeal. This is an elections case, and the Alaska Supreme Court is equipped to expedite its decision so that it rules before a special election is held. Even assuming it takes Recall Dunleavy only 60 days to collect the next round of signatures, so that they are validated by May 10, the Supreme Court has ample time to receive briefs and render a decision before the Division validates signatures and has to schedule the special election.

STWM will not be harmed if Recall Dunleavy collects signatures while an appeal is pending. Any risk of an adverse decision is on Recall Dunleavy, which will expend its

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

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22 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *Metcalfe*, 110 P.3d at 979).

23 The Division has not joined the request for stay. Recall Dunleavy recognizes that the Division may suffer some harm through the printing of recall petition booklets. To that end, Recall Dunleavy is amenable to posting a bond to cover the cost of printing those booklets.

time and money on the signature-gathering. STWM argues it would harmed because it would be "forced" to expend resources to campaign against the recall while the signature-gathering is ongoing. But this is not required; it is STWM's choice.

STWM also argues that it would be irreparably harmed because the Governor would be distracted from implementing his agenda. However, a governor is always at risk of distraction by citizens who criticize his performance. That is the nature of holding an elected office. Further, every elected official serves subject to recall; having to deal with a recall effort cannot be considered irreparable harm.

STWM's third argument of irreparable harm is just a reiteration of the legal arguments that this court already has rejected. Although STWM characterizes this court's holding as allowing vague charges to suffice for cause, this court correctly ruled that Plaintiff had alleged cause for recall based on the definitions of neglect of duty, lack of fitness, and incompetence applied by Alaska courts and attorneys general over the last thirty years.[24]

### C. STWM Cannot Make A "Clear Showing Of Probable Success On The Merits."

Given the irreparable harm Recall Dunleavy would suffer from additional delay in the recall process, STWM must make a clear showing of probable success on the merits for this court to grant a stay pending appeal.[25] This court has already rejected STWM's

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24 *See* S.J. Order.

25 *See Alsworth*, 323 P.3d at 54-56.



HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

legal arguments and ruled for Plaintiff. STWM does not come close to meeting the high bar of showing clearly that it will probably succeed with its appeal.

This court concluded that the State illegally withheld certification of Plaintiff's recall petition, ignoring decades of case law and precedent and adopting new standards to deny Alaskan voters the right to a recall.[26] This court did not blindly accept Recall Dunleavy's legal assertions. This court carefully considered the hundreds of pages of briefing on the subject, listened to over an hour of argument from all parties, and then only granted Recall Dunleavy's motion in part, striking one of the factual grounds for recall which it determined was not legally sufficient.[27] In doing so, this court correctly applied Alaska Supreme Court precedent, and the precedent from three other superior court decisions on recall, to order the certification of modified grounds for recall against Governor Dunleavy.[28] This court followed precedent to conclude that Alaska's recall statutes must be liberally construed, that the legislature's silence on the grounds for recall supports the definitions of cause that the court used, and that ties should go in favor of letting voters decide this inherently political question.[29]

Although it is certainly possible that the Alaska Supreme Court could reach an opposite conclusion, the Supreme Court would have to overturn decades of its own

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

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26 *See id.*
27 *See id.*
28 *See id.*
29 *See id.*

precedent to do so. STWM effectively concedes that overturning *Meiners* is indeed what it will ask the Supreme Court to do.[30] Given the constitutional right afforded to voters with respect to recall, the Recall Opponents are, at a minimum, unlikely to succeed on appeal. Their chances are speculative at best and STWM thus has not shown the *clear* likelihood of success on the merits that is required for this court to grant a stay.[31] This court should therefore deny STWM's request for a stay pending appeal under the probable success on the merits test.

## IV. CONCLUSION

Because a stay would cause irreparable harm to Recall Dunleavy and Alaskan voters, STWM cannot show any reasonable harm in the absence of a stay, and STWM cannot show a clear probability of success on the merits, this court should promptly deny STWM's motion for stay pending appeal.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 21 day of January 2020.

HOLMES WEDDLE & BARCOTT, PC

By: _____

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

30 *See* STWM's Mot. for Stay at 5-6.
31 *See Alsworth*, 323 P.3d at 54-56.

SUMMIT LAW GROUP

Jeffrey M. Feldman
Alaska Bar No. 7605029

REEVES AMODIO

Susan Orlansky
Alaska Bar No. 8106042

Attorneys for Plaintiff Recall Dunleavy

CERTIFICATE OF SERVICE
I hereby certify that on this 21 day of January 2020, a true and correct copy of the foregoing was sent to the following via hand delivery and e-mail:

Margaret Paton-Walsh
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

Brewster H. Jamieson
Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
Anchorage, AK 99501
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Brian Fontaine
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HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| RECALL DUNLEAVY, an unincorporated association,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS,<br><br>Defendants. | Case No. 3AN-19-10903 CI |
| STAND TALL WITH MIKE, an independent expenditure group,<br><br>Intervenor. | |

**|PROPOSED| ORDER DENYING STWM'S MOTION FOR STAY PENDING EXPEDITED APPEAL**

This court having reviewed Intervenor Standing Tall With Mike's Motion for Stay Pending Expedited Appeal, and Recall Dunleavy's opposition thereto, hereby orders that STWM's Motion for Stay Pending Expedited Appeal is DENIED.

DATED at Anchorage, Alaska this _____ day of _____, 2019.

_____
Eric A. Aarseth
Superior Court Judge

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of January 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

Brewster H. Jamieson
Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
Anchorage, AK 99501
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Brian Fontaine
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HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022
LANE POWELL LLC
1600 A Street, Suite 304
Anchorage, Alaska 99501
Telephone: 907-264-3325
907-264-3303
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Craig Richards, ABA No. 0205017
LAW OFFICES OF CRAIG RICHARDS
810 N Street, Suite 100
Anchorage, Alaska 99501
Telephone: 907-306-9878
crichards@alaskaprofessionalservices.com

Attorneys for Intervenor Stand Tall With Mike

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| RECALL DUNLEAVY, an unincorporated association,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS,<br><br>Defendants,<br><br>STAND TALL WITH MIKE, an independent expenditure group,<br><br>Intervenor. | Case No. 3AN-19-10903 CI<br><br>**STWM'S REPLY IN SUPPORT OF ITS MOTION FOR STAY PENDING EXPEDITED APPEAL** |

Intervenor Stand Tall With Mike ("STWM") replies in support of its Motion for Stay Pending Appeal, filed January 15, 2020, and to Plaintiff Recall Dunleavy's ("RDC") Opposition to STWM's Motion for Stay Pending Expedited Appeal ("Opposition"), filed January 21, 2020.

## I. INTRODUCTION

The parties agree on the law governing the Court's discretion to grant STWM's Motion for Stay Pending Expedited Appeal. So RDC opposes STWM motion with two arguments. First, it contends, either STWM has no irreparable harm or its irreparable harm without a stay is less than RDC's with a stay. Second, it asserts, STWM has no clear probability of success at the Alaska Supreme Court. To limit the court's discretion to grant a stay, RDC must be right about both arguments. But it is right about neither. STWM respectfully requests that the Court grant a stay pending an expedited appeal.

## II. ARGUMENT

### A. STWM Is the Only Party Likely to Suffer Irreparable Harm.

STWM members will suffer irreparable harm if the Court's order is not stayed pending appeal. So too will all Alaskans—including the 145,000 who cast a vote for Mike Dunleavy as well as potential signers of the recall application. If the RDC gathers signatures and the supreme court then invalidates even one of the twelve charges this court held were sufficient, there will be uncertainty about those signatures. Some signers will feel they have been subject to a bait-and-switch. The Governor's supporters will doubt the validity of a certified petition. Costly litigation will ensue, including, perhaps, about individual signatures. This problem is worse if an election is held before the supreme court can rule—the election would either moot the case, denying future parties the certainty of the supreme court's construction of Title 15, or put the supreme court in the unenviable position of undermining electoral repose. A stay pending a fast-track appeal avoids all of this. STWM and all Alaskans will be better off for it. RDC's arguments to the contrary are unavailing.

STWM will suffer irreparable harm in three ways if a stay is not granted.

First, STWM's members will be irreparably harmed by the need to expend limited money and volunteer time educating voters about charges that may not be certified. These

efforts will dilute STWM's resources and dull its message.[1] RDC says it will be STWM's choice to incur this harm.[2] This argument presents STWM with the choice of either suffering irreparable harm from a diluted campaign effort or staging no campaign effort at all. Parties faced with such a "Hobson's choice" between incurring harm or abstaining from desired action meet the requirements for an injunction. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (applying *Ex parte Young*, 209 U.S. 123 (1908)). RDC's callous argument that STWM could choose not to participate politically shows that STWM would suffer harm without a stay. Should the supreme court make any changes to the application's twelve surviving charges, there would be no party against whom STWM could recover its monetary harms, let alone its members' lost time on this effort.

Second, STWM members would suffer irreparable harm if the Governor were distracted from implementing his agenda by the need to defend against a wrongly certified recall election.[3] RDC argues that governors always face criticism that impedes their agendas.[4] The argument equates the unusual step of a recall election with run-of-the-mill criticism. But one poses a greater threat to the Governor's agenda than the other. Why else would RDC seek a recall election rather than merely voice its opposition? And why else would the Alaska Constitution have limited the grounds for recall while enshrining freedoms of speech and petition as protected rights? STWM will suffer the irreparable harm of the lost chance to put Alaska on a firmer fiscal footing if the Governor is required to defend a wrongly certified recall petition. Because Alaska law favors electoral repose, this harm will be all the more profound if a wrongly certified recall petition leads to the Governor's electoral defeat.[5] On this point, RDC does not argue otherwise.

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[1] Mot. 3.

[2] Opp. 7.

[3] Mot. 3–4.

[4] Opp. 7.

[5] Mot. 3–4.

Third, STWM members and all Alaskans face irreparable harm if Alaska's system of recall "for cause" is supplanted by a system of political recall.[6] RDC argues that the court has held otherwise.[7] But this argument assumes that the Court's holding will be affirmed. The point of a stay is to protect parties against irreparable harm in the event that the Court's holding is reversed. RDC's argument does not address the *harm* that STWM will suffer if the Court's decision is reversed without a stay in place.

Against STWM's harm, RDC urges that it will be harmed if its recall application is subject to "any and all delay."[8] RDC does not explain its interest in haste except to say that it prefers the Governor to be removed from office as soon as possible and that it wishes the process had moved more quickly than it has to date.[9] But this argument presupposes that RDC will actually prevail in a recall election, which is pure speculation.

Even accepting that a spring election could have been held had there been no legal dispute, this does not mean that RDC suffers irreparable harm by *further* delay. It does not offer any reason at all why a stay pending expedited appeal proceedings would, if RDC is successful, prevent it from gathering signatures in the spring with enough time for any recall election to be held concurrently with the August primary or November general election. Nor does it explain its evident objection to a recall election coinciding with a regularly scheduled election—at which voter participation is likely to be higher than in a special election.

The only "irreparable" harm RDC could suffer would be the inability to hold a recall election at all, or so late in the election cycle that the governor's term would conclude

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[6] Mot. 4.

[7] Opp. 7.

[8] Opp. 5.

[9] Opp. 5 ("If the recall application had been lawfully certified on November 4, 2019, the day of the unlawful denial, Plaintiff expects it could have submitted sufficient signatures by the end of 2019, causing a recall election to be scheduled in early spring. Alaskans could then have had a different governor address the legislature's budget and other laws proposed during this upcoming session.").

before a recall election could be held. Nothing of the sort is being suggested here—even with a stay, the *latest* recall election during 2020 would be one of the already-scheduled statewide elections. RDC cannot show that a short delay while the Alaska Supreme Court considers this matte of first impression will result in harm to them that is "irreparable."

RDC merely complains that the process should have moved more quickly already—but does not even attempt to describe the harm a short stay pending an expedited appeal will cause it. Even if RDC will suffer some harm from a delay—and it is not clear it will—its harm is less than the harm inherent in gathering signatures and holding an election premised on a wrong point of Alaskan constitutional law. A recall under Title 15 is a matter of first impression. All Alaskans benefit by making sure the contents of a recall petition meet statutory and constitutional requirements. To do otherwise risks uncertainty in the signature-gathering phase and a constitutional conundrum if the supreme court's decision conflicts with the results of an already-held election. At the least, there will be further delay while a court considers how to treat signatures appended to a petition stating one or more insufficient grounds for recall.[10] When the stakes are so high, it makes sense to measure twice and cut once. There is plenty of time to do so in this case.

**B. STWM Is Likely to Prevail on the Merits.**

STWM need only show that it raises a serious issue on appeal.[11] It easily does so because it shows probable success on the merits.[12] *Meiners v. Bering Strait School District*[13] addressed a different statutory and practical context. Accordingly, this is a case of first impression in Alaska. To the extent that case law construing Title 29 bears on Title 15, the supreme court's more recent decision in *von Staffenberg v. Committee for an*

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[10] *See* Non-Opp. Intervenor's Mot. Stay 2.

[11] *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970).

[12] *See id.*

[13] 687 P.2d 287 (Alaska 1984).

*Honest and Ethical School Board*[14] provides clearer guidance for this case than does *Meiners*.[15] Under the more recent *von Stauffenberg* case, a recall application does not state valid statutory grounds for recall when it targets the officeholder's lawful exercise of discretion.[16] As STWM has explained in its briefs, that is precisely what RDC's recall application does.

RDC responds by emphasizing that this Court's decision was well-considered.[17] This misses the point that the Court felt bound by the supreme court's *Meiners* decision. The supreme court decided *Meiners* more than thirty-five years ago, addressing a different statute and different practical realities. Since then, it has revisited *Meiners* only once, giving it tepid treatment in *von Stauffenberg*. An appeal in this case will present the supreme court with an opportunity to resolve tensions between the two cases that STWM identified in its briefs. STWM submits that the supreme court will affirm the reasoning in the more recent *von Stauffenberg* case and hold that one or more of the remaining twelve charges in RDC's applications is insufficient. This is probable. But because of the irreparable harm at issue, it need only be a serious appellate issue, and it is.

## III. CONCLUSION

The recall of a governor is unprecedented in Alaska. Because of the stakes for STWM and all Alaskans, along with the precedent this case sets for future state officeholders in Alaska, the supreme court should have the opportunity to address a live controversy not complicated by on-going signature gathering or mooted by an already-held election. The Court's stay pending an expedited appeal will permit an appeal while still

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[14] 903 P.2d 1055 (Alaska 1995).

[15] Because this case does not concern Tile 29, STWM need not request that the supreme court overturn *Meiners*.

[16] *Id.* at 1060.

[17] Opp. 8.

allowing Alaskans to vote for recall—if an application is certified and signatures gathered—at the appropriate time.

DATED this 23rd day of January, 2020.

LAW OFFICES OF CRAIG RICHARDS

By _____
Craig Richards, ABA No. 0205017

and

LANE POWELL LLC

By _____
Brewster H. Jamieson, ABA No. 8411122
Michael B. Baylous, ABA No. 0905022

Attorneys for Intervenor Stand Tall With Mike

I certify that on January 23, 2020, a copy of the foregoing was served by email, per court order, on:

S. Orlansky, Reeves Amodio LLC
susano@reevesamodio.com

J. Lindemuth, S. Kendall, S. Gottstein
Holmes Weddle & Barcott, PC
jlindemuth@hwb-law.com; smkendall@hwb-law.com;
sgottstein@hwb-law.com; Bfontaine@hwb-law.com

J. Feldman, Summit Law Group
jefff@summitlaw.com

M. Paton-Walsh, Office of the Attorney General
Margaret.Paton-Walsh@alaska.gov

C. Richards, Law Offices of Craig Richards
crichards@alaskaprofessionalservices.com

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY,
Plaintiff,
vs.
STATE OF ALASKA, et al.,
Defendant.

Case No. 3AN-19-10903 Civil

ORAL ARGUMENT ON MOTION TO STAY
January 29, 2020

BEFORE THE HONORABLE ERIC A. AARSETH
Superior Court Judge



A-P-P-E-A-R-A-N-C-E-S

For the Plaintiff:

Holmes Weddle & Barcott, PC
701 West 8th Avenue, Suite 700
Anchorage, Alaska 99501
BY: JAHNA M. LINDEMUTH
SCOTT M. KENDALL
SAMUEL G. GOTTSTEIN
(907) 274-0666

REEVES AMODIO, LLC
500 L Street, Suite 300
Anchorage, Alaska 99501
BY: SUSAN C. ORLANSKY
(907) 222-7117

SUMMIT LAW GROUP, PLLC
315 5th Avenue South, Suite 1000
Seattle, Washington 98104
BY: JEFFREY M. FELDMAN
(206) 676-7000

For the Defendant State of Alaska Division of Elections, et al.:

STATE OF ALASKA, DEPARTMENT OF LAW
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501
BY: MARGARET PATON-WALSH
KATHERINE DEMAREST
CORI M. MILLS
(907) 269-5275

For the Intervenor Stand Tall With Mike:

LANE POWELL, LLC
1600 A Street, Suite 304
Anchorage, Alaska 99501
BY: BREWSTER H. JAMIESON
(907) 277-9511

LAW OFFICES OF CRAIG RICHARDS
310 K Street, Suite 200
Anchorage, Alaska 99501
BY: CRAIG RICHARDS
(907) 306-9878



A-P-P-E-A-R-A-N-C-E-S, (continued)

Also present:

Gail Fenumiai, Director of Division of Elections
Becky Bohrer, Associated Press (telephonic)
James Brooks, Anchorage Daily News (telephonic)
Michele White, Coastal Television
Grant Robinson, KTUU



P-R-O-C-E-E-D-I-N-G-S

8:40:43

THE CLERK: -- the State of Alaska is now in session.

THE COURT: Thank you, please be seated. We're on record. This is in the case 3AN-19-1093 [sic] civil, it is on a motion for stay of this Court's rulings ordering the director of elections to issue the petition ballots. The motion was filed by the intervenor.

It was joined -- or nonopposed, I should say, by the defendants in this case, and opposed by the plaintiffs. We got time set for an oral argument.

We're getting started a -- about 10 minutes late, but we'll -- we'll just have to steal about 10 minutes beyond that time so we have plenty of time to hear argument on it.

What I'd anticipated was about 20 for the -- 20 for the intervenor and defendant, and you guys can divide your time as you want, 20 minutes for plaintiff. And then that leave -- leaves me 20 minutes to give you a decision here today.

As we did with the other oral argument, if

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you need a little more time, just let me know, make that request, and we'll -- we'll take care of it. So, Mr. Jamieson, that is adequate for you and Ms. Paton-Walsh in terms of about 10 minutes each? Or how do you want to --

MR. JAMIESON: Yeah, I think my -- my argument is -- is -- is prepared to be less than 10 minutes, so --

THE COURT: Okay. Sure. All right. Sounds good. All right. And you're ready to go then?

MR. JAMIESON: Yes, Your Honor.

THE COURT: Ms. Paton-Walsh?

MS. PATON-WALSH: Yes, Your Honor.

THE COURT: All right. And, Ms. Lindemuth? All right. Great. Go ahead, Mr. Jamieson.

MR. JAMIESON: Good morning, Your Honor. For the record, Brewster Jamieson on behalf of Stand Tall With Mike.

I want to begin by talking about the standard that Your Honor needs to apply today. I think it's well summed up in the Keane versus the Local Boundary Commission case; it's discretion guided by the public interest.

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And where the moving party here, Stand Tall With Mike, is the only one suffering irreparable harm, then Stand Tall With Mike must only show that there are serious questions on appeal that make them fair ground for litigation.

The higher burden of probable success on the merit -- merits does not apply. But even if it does, we think that it is met here.

I'd like to talk initially about the public interest and how it certainly argues in favor of a stay.

The way we look at it, Your Honor's made 12 separate decisions. You've got each of the four separate charges, met all three of the statutory grounds, lack of fitness and competence in elective duties.

If the Supreme Court overturns even one of these, then any signatures gathered in the meantime will be suspect.

We'll argue that they're void and we must begin again, but at a minimum we expect there to be further litigation on the issue.

And both the proponents and the opponents, but especially the public, will face uncertainty. And public --

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THE COURT: So your -- your -- your concern, as I understand it, is that the petition ballots will issue -- it will list in that petition ballot each one of those different grounds, a person may sign that.

And then the question is, if a ground drops off later on, then there's the question of whether, does that really meet the intent of that -- that voter who had actually signed the petition?

MR. JAMIESON: That -- that's precisely right. We -- the only information we have is the actual grounds that are shown to the potential voter and then the signature, and so we have to assume that they would have provided their signature based on something that was in the petition.

And if something drops out of that petition as finally decided by the Alaska Supreme Court, then we're left with uncertainty. And we --

THE COURT: So would -- would you say that when a -- if a person decides to sign that petition, they're not necessarily agreeing with every ground, it could be only one singular

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ground that they're -- that's the reason why they're signing that petition?

MR. JAMIESON: It's speculative. We don't know. And the one single ground -- if you want to speculate and say it's only one of the grounds -- it might be the one that is later stricken, is equally plausible that it would be that or all of them or -- or none of the ones that remain after the Supreme Court.

So that's the uncertainty that the public faces, and we believe that the public confidence in the validity and in the integrity of the recall process will be undermined. And there's no -- in our view, no reason to introduce that element of uncertainty into this process.

In addition, Stand Tall With Mike's members will suffer harm that is irreparable. They intend to oppose the signature gathering effort.

And as Your Honor appreciates, that the Governor doesn't get a chance to provide his rebuttal with the -- with the signature -- with the petition which signatures are being gathered.

And so opposing the signature gathering effort will require time and money. And if the

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signatures are gathered on the basis of a flawed petition, then they'll have to be a second petition -- signature gathering process and a second effort mounted to oppose that.

Nothing protects the Stand Tall With Mike from that eventuality if it occurs, and that harm would be irreparable. Their time is forever lost, their money is forever spent, and no one can make that up.

THE COURT: But that's a -- that's -- that's a choice that you -- you don't have to -- I mean --

MR. JAMIESON: Well --

THE COURT: -- it's a risk -- it's a risk assessment that they have to make, I believe, do we start -- do we start the opposition now or do we wait until a Supreme Court decision and see what happens? So --

MR. JAMIESON: Right. So I think Your Honor has held that this is a political process. And can you say, well, you can choose not to participate in the political process. That's, as we've said, a Hobson's choice, not much of a choice --

THE COURT: Okay.

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MR. JAMIESON: -- and -- and it's -- and it's really not fair to impose that on the litigants --

THE COURT: Okay.

MR. JAMIESON: -- in particular given the other public interests that are at issue here.

In addition, 145,000 Alaskans, slightly more than that, actually voted for this Governor based on, at least his commitments to put the state on a firmer fiscal footing.

And his important work with the legislature and the public is ongoing, literally as we speak.

And we don't believe that the Governor should be distracted and face the distraction of opposing a recall effort until the Supreme Court decides both that there will be a recall petition circulated, and then an election if the signatures are gathered, and defines exactly what the contours of the recall petition will be.

And that's what the Governor -- if he's going to be distracted by a recall petition, that's when the distraction would be required.

In addition, we don't see any harm to RDC here. The only complaint, that they wish the process would have moved along faster.

But all of their arguments, oh, we could have had an election and the Governor would have been voted out of office by now, that's pure speculation. There is -- there -- the -- that -- that remains -- very much remains to be seen.

The -- and you cannot base their harm on a speculative harm. It is not a -- it is not a real harm; it is speculative at best.

And the only irreparable harm that RDC could -- could face is if they're denied the opportunity to have a recall election at all.

And the -- for instance, if this were a situation where we were at the end of the Governor's term, then the clock could run out. That's not even close to happening here.

If the Supreme Court affirms on an expedited basis, they will -- the RDC will be able to hold the election if they gather the signatures, and the -- that election could happen either at one of the two already scheduled statewide elections or at another special election as the recall procedures allow.

They will never be denied their

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opportunity for -- to -- to hold a recall election. And that is the only thing -- that opportunity to hold the election, that's the only thing that they're guaranteed by the constitution and the statutes.

So, finally, the merits of the appeal --

THE COURT: You -- you -- you don't -- you don't think that the timelines that are in the statutes signal that the intention of the legislature was to have this be a fairly speedy process and not one that lingers?

MR. JAMIESON: Oh, right, but we're not talking about having it linger either. This was -- this was an -- an expedited process in the Superior Court.

It is an expedited -- it -- we propose an expedited -- and we are certain that the Supreme Court, given how they treat such things in other cases, it will be an expedited appeal before the Supreme Court.

And in either case, there is time to have due amount of speed with a full consideration and finality.

THE COURT: But you'd agree the statutes actually are the ones that kind of set up

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that timeline? I mean, they're -- the statutes themselves have very short turnarounds for a lot of these different steps that we need to go through.

MR. JAMIESON: Upon final certification, yes. But they also allow significant flexibility, both in -- in terms of, it can either be a special election or it can be -- if there's a general election or another statewide election, it can be held at that.

And here that -- that range of options, with a stay, is as open to RDC as it was without a stay -- or as it is without a stay.

Because of the irreparable harm to Stand Tall With Mike, we don't have to show probable success on the merits, but we think we can, but we think that it's -- it's reasonably likely that all or certainly a part of this Court's 12 decisions will be overturned or modified by the Supreme Court.

This is the first case under Title 15 as Your Honor -- that would -- that would go before the Supreme Court.

They've never considered the -- the contours of the middle ground approach to recall

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elections in the gubernatorial context. They've never -- the statute grounds have never been defined by our Supreme Court, and there's a lot of room to disagree about those definitions.

Embedded in the application, in particular -- in -- in particular in this application, there are embedded in it several constitutional issues of first impression.

Can a Governor be recalled for missing a deadline that the legislature imposed on his constitutional right and duty to make a judicial appointment, especially where that appointment was made and all of the constitutionally-required criteria were met?

Can a Governor be recalled based on a description of conduct that is not actually illegal?

Can a governor be recalled for exercising his discretionary line item veto power either intentionally or by mistake?

THE COURT: Okay. These -- these are questions that'll -- the Supreme Court's going to take a -- take a stab at, so --

MR. JAMIESON: That's right, and -- and they're -- they're very important questions --

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THE COURT: Right.

MR. JAMIESON: -- that need to be answered. And the finality and the certainty of those, yeah, and -- and having a signature gathering deadline occur -- or a signature gathering effort and an election if those signatures are gathered, after a short stay -- after that finality has and certainty has been decided by our Supreme Court, we think that is a -- a very good reason for Your Honor to exercise your discretion in favor of our motion and stay this matter pending the --

THE COURT: Right.

MR. JAMIESON: -- ruling of the Supreme Court.

THE COURT: Thank you.

MR. JAMIESON: Thank you.

THE COURT: Ms. Paton-Walsh?

MS. PATON-WALSH: Good morning, Your Honor.

THE COURT: Good morning.

MS. PATON-WALSH: I'm Margaret Paton-Walsh here for the Division of Elections, and we don't have a lot to add here.

The Division didn't move for a stay

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because we do not have the kind of harm that Mr. Jamieson was talking about for Stand Tall With Mike.

There's an administrative issue here for the Division, and I just want to say a few things about that so the Court understands and -- and to make a record.

The Director has informed me that the Division needs about a week from a moment when it's -- when it understands that it needs to print the booklets to when those booklets can be available.

If you rule today, Your Honor, that -- that eases the situation. But if we have further stay proceedings and the Supreme Court will need a week -- so there's a possibility that the deadline that you set in your original order might become an issue of -- of those timelines. I don't know how quickly the Supreme Court could act.

The other interest of the Division that I just wanted to highlight is, you know, the Division of Elections is already planning three different elections this year: The primary election, the REAA school board elections, and the general election, and the most important thing for

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it at this point is to get some sort of certainty about whether -- about sort of how this process is going to play out.

There are budgeting issues and there are timing issues and stopping issues. And so from the Division's perspective, the quicker all of this can get resolved, the better.

And if we can avoid additional litigation over validity of signatures, for example, that would be tremendous -- help from -- from the Division's perspective. And that's all I have, Your Honor. Thank you.

THE COURT: Thank you --

MS. LINDEMUTH: Good morning, Jahna Lindemuth, for Recall Dunleavy.

THE COURT: Good morning.

MS. LINDEMUTH: Your Honor, we would all like finality and certainty, but this desire for certainty is not reparable harm to Stand Tall. And it can best be addressed by an expedited appeal, not a stay. Because Recall Dunleavy faces irreparable harm, it cannot be adequately protected.

Stand Tall needs to make a clear showing of probable success on the merits to obtain a

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stay, something it cannot do because this Court has already ruled against it on the legal issues in this case.

Now, only if Stand Tall could establish it will suffer irreparable harm and that Recall Dunleavy could be adequately protected, would the lower balance of hardship standard apply, but a stay would still be inappropriate under the lower standard.

Effectively, Stand Tall is asking for an injunction against Recall Dunleavy from exercising its constitutional rights, which is very similar to the issues faced in the Alsworth v. Seybert case.

Now, this Court ordered petition booklets by February 10th. The only party potentially adversely affected by collecting signatures while an appeal is pending, if this Court is later reversed, is the plaintiff.

We are confident that this Court's order will be affirmed. And we are also confident that if this later -- if there is later changes to the petition, that the Supreme Court can deal with it at this -- at that time.

Now, I'd like to recall -- remind this

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Court that when the Supreme Court dealt with the fish initiative case, that was ballot -- or Proposition 1 approximately a year ago, the Supreme Court made significant changes to that language, and that was initiative language that would go before the voters for -- for vote.

And they didn't invalidate the signatures that led to that being on the ballot; they instead made changes and put it on the ballot. That is something that very well could happen in this case if there were changes.

Now, we -- we need to remember what Stand Tall's role is in this case, it's an intervenor. It is not an indispensable party; it is not something where this Court's order actually impacts them in any way.

They're not being ordered to do something. They're not being ordered to refrain from something.

Stand Tall has presented no evidence of irreparable harm in this case, and even its attorney's arguments of harm are speculative at best.

Choosing to undertake a campaign now against Recall and being forced to expend

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resources is monetary loss and is not -- and is by definition not irreparable harm.

We have no evidence before us what campaign activities they would take, even if a stay were entered, let alone if a stay is not entered and what campaign activities they would undertake.

THE COURT: But, Ms. Lindemuth, I -- I mean, one of the points that Mr. Jamieson made at the beginning of his argument was not so much necessarily as interveners, but just in terms of the public in general and the public interest.

And so it's a -- as you pointed out in the original arguments, it's a political process. There's going to be -- I'm assuming there's going to be campaigning.

There's going to be ads. There's going to be -- if -- if the petitions go out now and you're going to have people -- the committee is going to have people talking to the public and saying, do you want to sign this, and explaining those different grounds, if the Supreme Court decides that -- and let's say these two grounds that I grant, and they say, nope, that was wrong, Judge Aarseth, and so those need to be stricken, you

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know, what duty does -- does the -- the RDC have in terms of going back and explaining to the people, well, we told you that this was one of the grounds, but now it's not one of the grounds for the recall, and doing a clarity? I mean, there really is no duty, is there?

MS. LINDEMUTH: Your Honor, that's something that the Supreme Court would deal with at that particular time if they struck, and then they would decide what -- what needs to happen at that particular point.

I mean, worst-case scenario for us is --

THE COURT: But you were -- you were talking about the petition booklets, okay, and that's -- that -- that's one sto- -- that's one -- not (inaudible) legitimate concern in terms of looking at whether --

MS. LINDEMUTH: Uh-huh.

THE COURT: -- that constitutes irreparable harm or not, and you've got an argument of why it does.

But I -- I guess the other part of this is that, just, the public as a whole understanding, okay, the petition -- the petition is going forward and these are the grounds and not having

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to -- and -- and nobody having to spend time saying, well, that was a ground but now it's no longer a ground.

And so what -- what -- how does that get clarified for the public?

MS. LINDEMUTH: Well, in the end, Your Honor, the Supreme Court will deal with whether the petition booklets themselves are valid.

But eventually what will happen and what the public interest will be is when they go into the voter booth, and at that particular time the grounds will be clearly stated, those that are affirmed by the Supreme Court -- we're confident it'll be all four grounds that this Court has -- has -- has stated -- but that is something that can happen at that particular point in time.

I'd also like to point out that -- that this whole process is very public and everything that happens in this case is on the front page of the -- of the paper and in the news every day, so --

THE COURT: I found that out.

MS. LINDEMUTH: -- so -- yeah, so I think -- I think that the -- we -- that the public

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will be well-informed at the time when the ultimate decision needs to be made, which is in the -- ultimately in the voter booth.

The second ground that -- that they argued for -- for harm is that having a Governor distracted, that is also not something that is harm that justifies a stay in this case.

And the Governor has publicly stated that he will not be distracted by the recall from governing or implementing his agenda, and that was in a January 21st article that -- or interview that he gave Andrew Kitchenman at Alaska Public Radio.

Well, the third ground, lack of cert- -- the lack of immediately -- certainly on the recall law -- laws, is also not irreparable harm, that's just a recast of the legal arguments that they've made in this case, and that certainty that will be obtained will be by the Supreme Court ruling -- ultimately ruling in this case.

On the other hand, plaintiff will be irreparably harmed if the stay is entered, and that -- and -- and it cannot be adequately protected.

The -- the proponents of the recall are

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constitutional entitled to a recall process, that's Article 11, Section 8 of the Constitution. And that process is intended to move quickly.

Now, Stand Tall has -- has argued that we really have all the time in the world as long as this happens 180 days before the end of the Governor's term, which in itself is ludicrous, but also illustrates how every day of delay is harm to the recall proponents.

We have to recall that the -- the statutes applicable here, Alaska Statute 15.45 also apply to State representatives with two-year terms, not just to Governors who have four-year terms.

This process is intended to happen very quickly, and the -- the recall proponents are the ones who determine the speed and the timing of -- of -- of -- of how quickly that can go.

The only issue is how quickly can you collect signatures. And once a petition is submitted to the Division with sufficient signatures, strict timelines apply that the -- that the State cannot deviate from.

You have 30 days to validate those signatures and you have 60 to 90 days after validation of signatures to hold a special

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election.
Now, if we had not been wrongfully denied certification at the very front end, we would be having a -- there would be a recall election already scheduled and we'd be at that stage.
Now, the -- the current lack of -- of certainty is, again, not irreparable harm, and -- but all the parties desire certainty.
It has been three weeks since this Court -- almost three weeks since this Court issued its initial ruling, and we're still not before the Supreme Court.
What needs to happen is that the final judgment that we submitted last week, Your Honor -- it's been agreed to by all parties -- needs to be signed; the appeal needs to be filed immediately. We can get in with the Supreme Court on to scheduling this -- how quickly the appeal can happen.
And there's several possibilities once this reaches the Supreme Court, and they can deal with the stay issue at that point in time as they deal with scheduling.
Now, we dealt with this very similar issue last fall in the Alaskans for Better Elections

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ballot initiative case that was decided in November.
Ms. Paton-Walsh, on behalf of the State in that particular case, asked the Supreme Court for a super expedited appeal, two-and-a-half weeks to argument.
The Supreme Court denied that request and allowed signatures to be gathered while the -- the appeal was on a regular expedited appeal, which was a three-month period.
So from the decision in November, we're now facing argument in February, but signature collection happened in the meantime. That's an option.
We're also amenable to a two-and-a-half week briefing schedule to get this on the February calendar, but these are all issues for the Supreme Court to deal with once the appeal is filed.
And, you know, the -- so the -- the main ask that we had today is that the final judgment be entered and that the stay be denied and that this all can move up to the Supreme Court where they can deal with the whole issues of what happens in the interim while they decide this case. Thank you, Your Honor.

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THE COURT: Okay. There was some time remaining on -- from Ms. Paton-Walsh. Ms. Paton-Walsh or Ms. -- Mr. -- do you mind allowing Mr. Jamieson the additional time? Okay.
MR. JAMIESON: Well, I won't belabor anything, Your Honor. I think Your Honor has been well-advised by the briefing and by the arguments, but I would say that this case has moved along incredibly quickly.
By contrast, the Coghill case took over a year at the Superior Court level. This case has moved along at light speed.
The only guarantee that RDC has in this -- by the constitution is the right to have a recall election; that's the only thing they're guaranteed by the statutes. That is not impacted by a stay while we get finality.
Your Honor, we use the phrase "measure twice and cut once." And if ever there was a circumstance where it makes sense to measure twice and cut once, it's here, because this matter is so high profile, because the stakes are so high, it makes sense to get this finally decided before any of the process starts moving, and that's why we would request that the stay be granted.

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In addition, Your Honor, we have no objection to entering final judgment. In fact, we were hoping that it would have been done by now.
And, Your Honor, we -- we do note that we can't move for a stay with the Supreme Court unless we've actually made this motion.
Herein, Your Honor is obliged, of course, to take this motion seriously and -- and rule in favor of it, if that's what Your Honor's discretion tells you to do.
So -- so here we are. We -- I think all the parties would like rulings. And we would like to move on to the next level, but we also want to do so with due care and with -- by measuring twice and cutting once. Thank you, Your Honor.
THE COURT: All right. First of all, I'd just like to just apologize to the parties for the confusion on the -- the order.
I think parties and litigants in the courtroom understand when a Court says that there was inadvertent -- it was inadvertently issued, you understand what that means, and so I apologize for the confusion.
I don't know -- there's anything else (inaudible) say for the public to understand that,

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other than we're humans and there are mistakes that happen. I corrected it as quickly as I could, and -- and I think I'll just leave it at that.

The -- I think the important part of this is that -- and from my perspective, as I'm hearing from the individual parties -- which you -- you are representing a slice of the public, and there are many different voices -- and I think Mr. Jamieson is correct at the very beginning when he said this is about public interest, and both sides are arguing public interest, you just have different viewpoints in terms of -- of, you know, what that should look like in terms of this process.

My decision tried to emphasize repeatedly that the -- the -- the Court was trying to -- trying its best to stay out of the way of the public being able to express its opinion, that starts with the legislatures that are voted into office and the decisions they make in terms of the statutes and their definitions and the -- the -- how they define this recall process.

And -- and if the signatures are met and the grounds are met, then the voters get a chance

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to make a decision at an election in terms of whether, you know, the recall is -- is going to occur or not.

And so the Court's interest in this, again, is not picking one side or the other. The Court's interest is trying to preserve and protect the voter's ability to express that -- their opinion in terms of, is the government -- is the people that are representing us in the government doing the job correctly? Should they stay in office or not stay in office?

And the legislature made it very clear in terms of the grounds that this can't just be for any reason that they don't happen to like, there's got to be these specific grounds that are met.

And so I think that adds some weight in terms of what this process is. Yes, we're supposed to move quickly; but, yes, we're also supposed to move carefully in terms of how we do this.

The -- so when you have in mind that this is a process where the public is making this decision, you want to have as much clarity for the public as you can when they have to start making these decisions, and that really is going to start

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when those petitions are issued and signatures are being gathered.

There is going to be a lot of discussion -- there is already a lot of discussion, but it's really going to -- rubber hitting the road when those petition ballots -- booklets, excuse me, issue.

And the -- the -- from the Court's perspective, if we have members of the public making a decision, am I going to sign this petition booklet or not, and they're looking at the grounds and they're making that decision, if they sign it one day and all the grounds that I've approved thus far are there and then the Supreme Court says, Judge Aarseth, you made a mistake, and there's a couple grounds that shouldn't have been there, that is going to create confusion.

And from the Court's perspective, confusion equals harm. Is it an irreparable harm? It's something I briefly brought up with the plaintiffs, there is no cure for that.

It's going to -- it then starts becoming, who has the burden to try to explain that. And if the burden ends up following -- falling on the interveners, you know, then they're having to, you

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know, carry more water in this process than they probably should have had to do because it wasn't a ground that they shouldn't have had to defend.

And in the Court's perspective and in this analysis, that that then becomes irreparable because there isn't a good cure for that. And -- and it is a -- a harm that can happen.

So on that -- on that singular point -- and I won't (inaudible) go through the remainder of the points then, the Court finds that the interveners have demonstrated that there could be an irreparable harm if the Supreme Court strikes down one of the grounds and yet we have the petition booklets that have issued stating all of the grounds and there's going to have to be some clarity, you know, provided to the public. And so that can't happen, so, therefore, the Court's finding that there's irreparable harm.

The next step then in this analysis is, is it a serious issue? No one argued today whether or not it's a serious issue.

In fact, I kind of cut Mr. Jamieson off because I don't think that there's really a -- a matter of dispute that this is a serious issue, and so for those reasons this Court is going to

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stay -- grant the motion for stay and it's going to relieve the Director from the -- I believe it's the February 10th deadline that the Court had issued.

The stay will remain until the Supreme Court makes its decision. And it is this Court's intention that decision by the Supreme Court -- obviously they have the -- the -- the authority, but that they can automatically lift that stay in terms of their own order or they'll return it back to this Court, and this Court will lift the stay, depending on what the ruling is by the Supreme Court.

So any clarity on that in the language of what -- what should be stated as far as the -- the stay being in place or the Director's relieved of issuing those petition ballots right now and how it's going to be lifted? Mr. Jamieson?

MR. JAMIESON: No, it's clear, Your Honor. Thank you.

THE COURT: Ms. Paton-Walsh?

MS. PATON-WALSH: No, Your Honor.

THE COURT: Ms. -- Ms. Lindemuth?

MS. LINDEMUTH: No, Your Honor. Can I make a request though?

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THE COURT: Yes.

MS. LINDEMUTH: Your Honor, obviously we disagree with this Court's order and we could petition for review on that, but I think that's -- the cleaner thing would be to require that the stay and then Stand Tall file their appeal by the end of the week so that we're before the Supreme Court immediately and that we can sort these things out, because we want to get this decided by the Supreme Court as soon as possible, because with the stay in place, there really is no incentive for the -- for the stay and Stand Tall For Mike not to wait another 30 days to file their appeal.

THE COURT: Mr. Jamieson?

MR. JAMIESON: Your Honor, if I might request until Monday, I have other matters that will keep me busy the rest of the week, but certainly by Monday.

And I'll let Ms. Paton-Walsh -- but, yes, we -- we intend -- we -- we meant it when we said we would agree to a -- an expedited appeal, and so we meant that, and -- and we would agree with that.

THE COURT: Monday being the 3rd or

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Monday being the 10th.

MR. JAMIESON: Monday being the 3rd. That is this -- this coming Monday; is that right, is that the 3rd? Yes.

UNIDENTIFIED SPEAKER: Yes.

MR. JAMIESON: Get this right, yes.

THE COURT: Yes, it's moving along. Ms. Lindemuth, does that satisfy your concerns?

MS. LINDEMUTH: Yes, Your Honor.

THE COURT: All right. That will be the Court's order. The final judgment will -- I anticipate will issue today, and the order regarding the stay will issue today.

And I will enter an order now -- and, in part, that is appropriate because my decision today in terms of the stay also did anticipate the -- there being an expedited appeal, everybody agreeing on that.

And so I will enter the order that if there is going to be an appeal by the interveners, which we expect, then that be filed -- that -- that opening notice be filed no later than the 3rd of February, and that -- through the court, then processes will take over and their procedural rule, so -- and is the State intending on

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appealing the decision as well? So are you joining in that with an opening notice or --

MS. PATON-WALSH: And, Your Honor, we'll file our appeal at the moment we get a final judgment. Our paperwork is ready to go, so we'll --

THE COURT: Okay.

MS. PATON-WALSH: -- probably file this week.

THE COURT: So I can include the State in that deadline, no later than the 3rd --

MS. PATON-WALSH: Yes, Your Honor.

THE COURT: -- of February? All right. Thank you. Anything else, Ms. Lindemuth? All right. Mr. Jamieson?

MR. JAMIESON: No, Your Honor.

THE COURT: Ms. Paton-Walsh?

MS. PATON-WALSH: No, Your Honor.

THE COURT: All right. Thank you. All right. We'll go off record.

THE CLERK: Off record. This court stands in rece- --

9:14:24

(Off record.)

CERTIFICATE

I, Brooklende D. Leavitt, hereby certify that the foregoing pages numbered 4 through 36 contain a true, accurate and complete transcript of the Oral Argument on Motion to Stay, held on January 29, 2020, in Recall Dunleavy versus State of Alaska, et al., Case No. 3AN-19-10903 Civil, transcribed by me to the best of my knowledge and ability from the electronic sound.

_____ _____

Date Brooklende D. Leavitt